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Letter dated 12 May 2009 from the Permanent Observer of the League of Arab States addressed to the President of the Security Council

I have the honour to forward the letter dated 10 May 2009 addressed to you from Mr. Amre Moussa, the Secretary-General of the League of Arab States, regarding the situation in Gaza as a result of the Israeli attack which started on 27 December 2008 which led to the dire humanitarian situation in the Strip. Enclosed, please, find the final version of executive summary of the report prepared by the Independent Fact-Finding Committee on Gaza (the full report is available on the Arab League website (www.arableagueonline.org)) (see annex).

Pursuant to Article 54 of the Charter of the United Nations, I should be grateful if you would arrange for the present letter and its annex to be circulated as a document of the Security Council.

(*Signed*) Yahya **Mahmassani**
Ambassador

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Annex to the letter dated 12 May 2009 from the Permanent Observer of the League of Arab States addressed to the President of the Security Council

I am writing to you regarding the situation in Gaza as a result of the Israeli attack which started on 27 December 2008 and led to the dire humanitarian situation in the Strip.

There are numerous allegations of war crimes as well as severe violations of international humanitarian law committed during the Israeli aggressive operations.

Stemming from the need for credible assessments, the League of Arab States decided to send an Independent Fact-finding Committee of independent international experts to the Strip. The Committee was headed by Mr. John Dugard of South Africa, and was composed of the following members: Mr. Gonzalo Boye of Germany and Chile; Judge Finn Lynghjem of Norway; Professor Paul de Waart of the Netherlands; and Professor Francisco Corte-Real of Portugal, as the forensic body damage evaluator. Ms. Raelene Sharp of Australia served as the Rapporteur. The Committee visited Gaza during the period from 22 to 27 February 2009 and held meetings with a wide spectrum of personalities, including representatives of international organizations and non-governmental organizations, as well as victims affected by the armed conflict. Members of the Committee also visited a number of sites that were attacked in the Strip.

The final version of the executive summary of the report prepared by the Committee is enclosed herewith (see enclosure). The full report is available on the website of the Arab League (www.arableagueonline.org).

(*Signed*) Amre **Moussa**

Enclosure

Report of the Independent Fact-Finding Committee On Gaza:

No Safe Place.

Presented to the League of Arab States.

30 April 2009.

Executive Summary.

1. The Independent Fact Finding Committee on Gaza to the League of Arab States (the Committee) was established in February 2009 with the tasks of investigating and reporting on violations of human rights law and international humanitarian law during the Israeli military offensive (hereinafter operation *Cast Lead*) against Gaza from 27 December 2008 to 18 January 2009 and collecting information on the responsibility for the commission of international crimes during the operation. The Committee comprised Professor John Dugard (South Africa: Chairman), Professor Paul de Waart (Netherlands), Judge Finn Lynghjem (Norway), Advocate Gonzalo Boye (Chile/Germany), Professor Francisco Corte-Real (Portugal: forensic body damage evaluator) and Ms Raelene Sharp, solicitor (Australia: Rapporteur).

2. The Committee held an initial meeting with the Secretary-General of the Arab League and his staff in Cairo on 21 February. It then travelled to Gaza on 22 February, which it entered at the Rafah crossing. The Committee was accompanied by three representatives of the League: Mr Radwan bin Khadra, Legal Advisor to the Secretary General and Head of the Legal Department, Mrs Aliya Ghussien, Head of Palestine Department, and Ms Elham Alshejni, from the Population Studies and Migration Department. The Committee was also accompanied by Mr Omar Abdallah from the Egyptian Foreign Ministry.

3. The Committee remained in Gaza from 22 to 27 February. The programme for its visit was organized by the Palestinian Centre for Human Rights, which provided logistical support to the Committee. The Committee met with a wide range of persons, including victims of operation *Cast Lead*, witnesses, members of the Hamas Authority, doctors, lawyers, businessmen, journalists and members of NGOs and United Nations agencies. It visited the sites of much of the destruction, including hospitals, schools, universities, mosques, factories, businesses, police stations, government buildings , United Nations premises, private homes and agricultural land.

4. The Committee collected a wealth of information from many sources, including the websites of the Israeli Foreign Ministry and Israel Defense Forces (IDF), Israeli newspapers and NGO reports, the reports of Palestinian and international NGOs, United Nations publications, Palestinian official documents and the testimony of witnesses to the conflict. On three occasions, the Committee wrote to the Government of Israel requesting its co-operation. Such letters were faxed to the Government in Israel and later delivered to the Israeli embassies in the Netherlands and Norway. The Committee received no response to its requests for co-operation, which compelled it to rely on official websites, publications and the media for information about the Israeli perspective. The Committee regrets the decision of the Government of Israel to withhold co-operation

5. The Committee's visit to and experiences in Gaza inevitably influenced and shaped its opinions and assisted it in making its findings. The Committee's impressions and the inferences that it drew from what it saw and heard were corroborated by information from other sources. However, it could not have carried out its mandate without the visit to Gaza which allowed it to see for itself the destruction and devastation caused by operation *Cast Lead* and to speak to those who had experienced and suffered through the offensive.

6. The Committee's report is divided into three main parts: a factual description and analysis; a legal assessment and possible remedies; and recommendations. The factual

description includes a report by the body damage evaluator, who examined 10 individuals who sustained injuries during operation *Cast Lead*. Operating under internationally recognised standards, the report documents the injuries suffered and their alleged causes.

The Facts

7. The Committee saw, heard and read evidence of great loss of life and injury in Gaza. Statistics accepted by the Committee show that over 1,400 Palestinians were killed, including at the very least 850 civilians, 300 children and 110 women. Over 5,000 Palestinians were wounded. The Committee was unable to accept the figures given by Israel, which claim that only 295 of those killed were civilians, as they do not provide the names of the dead (unlike Palestinian sources). Moreover, Israel includes policemen as combatants, whereas they should be considered as civilians, and it asserts that only children below the age of sixteen qualify as such, whereas the accepted international age for children is eighteen. The Committee heard disturbing accounts of cold-blooded killing of civilians by members of the IDF, accounts which were later confirmed by Israeli soldiers at the Oranim military college.

8. Four Israeli civilians were killed by Palestinian rockets during operation *Cast Lead* and 182 wounded. Ten Israeli soldiers were killed (three by friendly fire) and 148 wounded.

9. Palestinian fighters had only unsophisticated weapons - Qassam rockets and Grads- whereas Israel was able to employ the most sophisticated and modern weaponry to bombard the population of Gaza from the air, land and sea. Although Israel initially denied it had used white phosphorous in the offensive it later admitted its use but denied it had been used unlawfully. The Committee is, however, satisfied on the available evidence that white phosphorous was used as an incendiary weapon in densely populated areas.

10. There was substantial destruction of, and damage to property during the offensive. Over 3,000 homes were destroyed and over 11,000 damaged; 215 factories and 700 private businesses were seriously damaged or destroyed; 15 hospitals and 43 primary health care centres were destroyed or damaged; 28 government buildings and 60 police stations were destroyed or damaged; 30 mosques were destroyed and 28 damaged; 10 schools were destroyed and 168 damaged; three universities / colleges were destroyed and 14 damaged; and 53 United Nations properties were damaged.

11. It was clear to the Committee the IDF had not distinguished between civilians and civilian objects and military targets. Both the loss of life and the damage to property were disproportionate to the harm suffered by Israel or any threatened harm. There was no evidence that any military advantage was served by the killing and wounding of civilians or the destruction of property.

12. The Committee received evidence of the bombing and shelling of hospitals and ambulances and of obstructions placed in the way of the evacuation of the wounded.

13. The 22-day offensive with bombing and shelling from the air, sea and land traumatized and terrorised the population. Israel dropped leaflets warning the population to evacuate, but in most cases failed to give details of the areas to be targeted and conversely which areas were safe. Phone calls were equally confusing. Generally, the leaflets and phone calls simply served to confuse the population and to cause panic.

14. Israel has defended its actions by arguing that buildings were used to store munitions and hide militants and that the Palestinians made use of women and children as human shields. The Committee received evidence of human shields being used by both Hamas and Israel and has not been able to verify the truth of these allegations. Nevertheless it does not believe that such large scale killing and wounding can be attributed to the use of human shields. Similarly, Israel has produced no credible evidence of buildings being used to harbour munitions and militants. Again, it is likely that this did occur in some cases but it could not possible justify the type and amount of killing and wounding and damage to property that occurred.

15. The IDF conducted an internal investigation into allegations that its forces committed international crimes. It found that although there were a few irregularities international crimes were not committed by its forces. The Committee is unable to accept those findings. The Committee finds the IDF investigation to be unconvincing as it was not independent. There is also no suggestion that it considered Palestinian sources.

Legal Assessment

16. Before making its legal assessment, the Committee considered a number of issues that might affect criminal responsibility for any crimes that were committed. The Committee found that:

    (1) Gaza remains occupied territory and that Israel is obliged to comply with the Fourth Geneva Convention in its actions in Gaza.

    (2) Due to the uncertain meaning of 'aggression' it could make no finding on the question whether Israel's offensive constituted aggression.

    (3) Israel's actions could not be justified as self-defence.

    (4) It could not examine the criminal responsibility of either Israel or Hamas in the context of international terrorism as the meaning of both state terrorism and terrorism by non-state actors is too uncertain; consequently, criminal responsibility was best measured in accordance with the rules of international humanitarian law.

    (5) Principles of proportionality should be applied in assessing criminal responsibility.

17. The focus of the report is on international crimes and the available remedies for prosecuting such crimes. Consequently little attention is paid to violations of human rights law and international humanitarian law that do not constitute international crimes. Nevertheless, the Committee found that there had been serious violations of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. There were also violations of the Fourth Geneva Convention and its Additional Protocols, particularly in respect of the prohibition on collective punishment.

18. The Committee then turned to the question of international criminal responsibility arising from the conflict. Here it considered war crimes, crimes against humanity and genocide.

War Crimes

19. The Committee examined the responsibility of parties to the conflict for the commission of only of those war crimes which are generally accepted and whose meaning and content is clear.

20. The Committee found that the IDF was responsible for the crime of indiscriminate and disproportionate attacks on civilians. In reaching this conclusion the Committee had regard to the number of civilians killed and wounded and to the extent of the destruction to civilian property. It rejected Israel's determination of who is a civilian. Members of the Hamas civil government responsible for administering the affairs of Gaza are not combatants as claimed by Israel. Nor are members of the police force responsible for maintaining law and order and controlling traffic.

21. The Committee also found that Palestinian militants who fired rockets into Israel indiscriminately, committed the war crime of indiscriminate and disproportionate attacks on civilians.

22. The Committee found that the IDF was responsible for the crime of killing, wounding and terrorizing civilians. The Committee based this finding on the number of civilians killed by 22 days of intense bombardment by air, sea and land. The Committee also found the weapons used by the IDF, particularly white phosphorous and flechettes, caused superfluous and unnecessary suffering.

23. The Committee rejected Israel's claim that it had warned civilians to evacuate their homes by leaflets and phone calls. The leaflets and phone calls generally failed to tell civilians which targets were to be bombed and where they might find safety. As a result they only served to cause confusion and panic. Incessant bombing and misleading warnings of this kind served to terrorize the population.

24. The Committee found that Palestinian militants who fired rockets indiscriminately into Israel which killed four civilians and wounded 182 committed the war crime of killing, wounding and terrorizing civilians.

25. The Committee found that the IDF was responsible for the wanton destruction of property and that such destruction could not be justified on grounds of military necessity. The number of civilian properties destroyed was completely disproportionate to any harm threatened and there was no credible evidence that the destruction served any military advantage.

26. There was considerable evidence that the IDF and its members had bombed and shelled hospitals and ambulances and obstructed the evacuation of the wounded. In the opinion of the Committee this conduct also constituted a war crime. The Committee was not able to accept the findings of the IDF internal investigation on this subject as it took no account of Palestinian allegations.

Crimes Against Humanity

27. A crime against humanity comprises acts of murder, extermination, persecution and similar other inhumane acts committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. The Committee found that Israel's offensive met the legal requirements for this crime and that the IDF was responsible for committing this crime.

Genocide

28. Genocide is considered the "crime of crimes". It has been singled out for special condemnation and opprobrium. The very suggestion that a state has committed genocide should therefore be approached with great care. Nevertheless the Committee believes that operation *Cast Lead* was of such gravity it was compelled to consider whether this crime had been committed.

29. The Committee found Israel's actions met the requirements for the *actus reus* of the crime of genocide contained in the Genocide Convention, in that the IDF was responsible for killing, exterminating and causing serious bodily harm to members of a group - the Palestinians of Gaza. However, the Committee had difficulty in determining whether the acts in question had been committed with a special intent to destroy in whole or in part a national, ethnical or religious group, as required by the Genocide Convention. It rejected the argument that Israel had carried out operation *Cast Lead* in self-defence. However, it found the main reason for the operation was not to destroy a group, as required for the crime of genocide, but to engage in a vicious exercise of collective punishment designed either to compel the population to reject Hamas as the governing authority of Gaza or to subdue the population into a state of submission.

30. The Committee found although operation *Cast Lead* had not been carried out by the IDF to destroy the Palestinians of Gaza as a group, individual soldiers may well have had such an intent and might therefore be prosecuted for this crime. This finding was based on the brutality of some of the killing and reports that some soldiers had acted under the influence of rabbis who had encouraged them to believe that the Holy Land should be cleansed of non-Jews.

State Responsibility For Genocide

31. Under international law a state may be held responsible for the commission of internationally wrongful acts that are attributable to it. Such responsibility may arise from customary international law or in terms of treaty obligations. It is clear internationally wrongful acts were committed by Israel in operation *Cast Lead*.

32. Most human rights and international humanitarian law treaties do not confer jurisdiction on the International Court of Justice for the commission of internationally wrongful acts under such conventions. However, the Genocide Convention, in Article 9, confers such jurisdiction on the International Court of Justice in respect of the responsibility of a state for violation of the Convention, at the request of any other state party. It is not be necessary for the other state party to show that it has a national interest in the dispute as the prohibition on genocide is an obligation *erga omnes*.

33. Proof of the commission of genocide is a prerequisite for bringing a claim under the Genocide Convention. It has already been shown that the Committee was not able to find that the state of Israel acting though the IDF had the necessary specific intent to destroy a group as required for the crime of genocide. On the other hand, there is a prospect that such a claim might succeed if it can be proved that individual members of the armed forces committed acts of genocide while they were acting under the direct control of the Government of Israel. Such a scenario would allow Israel to be held responsible under the Genocide Convention for failure to prevent or to punish genocide.

Responsibility Of Israel

34. The Committee has found that members of the IDF committed war crimes, crimes against humanity and, *possibly*, genocide in the course of operation *Cast Lead*. Those responsible for the commission of such crimes are individually responsible for their actions, as are those who ordered or incited the commission of such crimes or participated in a common purpose to commit such crimes. Military commanders and political leaders are likewise responsible for crimes committed under their effective command, authority or control where they knew or should have known the forces were committing such crimes and they failed to prevent or repress the commission of such crimes or to investigate and prosecute those responsible.

Responsibility Of Hamas

35. As the governing de facto authority of Gaza, Hamas may be held responsible for violations of international humanitarian law attributed to it. Individuals who have fired rockets indiscriminately into Israel are criminally responsible for their actions and must be held accountable for them under the law governing the commission of war crimes. In assessing the responsibility of Hamas and individual Palestinian militants there are a number of factors that reduce their moral blameworthiness but not their criminal responsibility. Such factors include the fact Palestinians have been denied their right to self-determination by Israel and have long been subjected to a cruel siege by Israel.

Remedies

36. There are a number of remedies in the criminal law field that may be invoked by states, NGOs and individuals to secure redress for crimes committed in Gaza. These include prosecutions for violation of the Fourth Geneva Convention in national courts in accordance with Articles 146 and 147 of the Convention, prosecutions pursuant to universal jurisdiction statutes which allow a person to be prosecuted in a third country for an international crime committed extraterritorially, and referral to the International Criminal Court. On 22 January 2009 the Palestinian Minister of Justice, Mr Ali Kashan, lodged a declaration with the Registrar of the International Criminal Court on behalf of the Government of Palestine recognizing the jurisdiction of the Court for international crimes committed in Palestine since 1 July 2002 under Article 12(3) of the Rome Statute. At this time the Registrar is still considering her decision. The Committee believes that the International Criminal Court should accept the declaration lodged by the Government of Palestine and investigate the commission of international crimes in the course of operation *Cast Lead*.

37. There are also a number of civil law remedies available to states, NGOs and individuals. As shown above, states may be able to initiate proceedings against Israel for failure to prevent or to punish the commission of the crime of genocide if it can be established that members of it armed forces were responsible for the commission of that crime.

38. The American Alien Tort Act, which allows American Federal Courts to exercise jurisdiction in any civil action brought by an alien for violation of a peremptory norm of international law outside the United States, is another remedy that may be considered.

39. Procedures within the United Nations may also be invoked. States may request the Security Council to refer the situation in Gaza to the International Criminal Court in

the same way that such a referral was made in the case of Darfur in Resolution 1593 of 31 March 2005. States may also request the General Assembly to request the International Court of Justice for an Advisory Opinion on the legal consequences of operation *Cast Lead* for Israel and other states. In 2005 the General Assembly adopted the Summit Outcome Document in which the United Nations undertakes the responsibility to protect states against genocide, war crimes and crimes against humanity. The General Assembly, and possibly the Security Council, might be approached to take action under this commitment.

Recommendations

40. The Committee makes the following recommendations:

Recommendations to Organs of the United Nations.

(1) The League of Arab States should request the General Assembly of the United Nations to request the International Court of Justice to give an advisory opinion on the legal consequences for states, including Israel, of the conflict in Gaza between 27 December 2008 and 18 January 2009 (the Conflict in Gaza).

(2) The League of Arab States should request the Security Council to refer the situation in Gaza, arising from Operation Cast Lead, to the Prosecutor of the International Criminal Court under Article 13(b) of the Rome Statute.

(3) The League of Arab States should request the Security Council, failing which, the General Assembly, to exercise its Responsibility to Protect, affirmed in the Summit Outcome Document of 2005 in respect of Gaza.

Recommendations involving the International Criminal Court.

(4) The League of Arab States should endorse Palestine's declaration accepting jurisdiction of the International Criminal Court under Article 12(3) of the Rome Statute. If the Security Council fails to refer the situation in Gaza to the International Criminal Court under Article 13(b) of the Rome Statute (Recommendation 2), the League of Arab States should request the General Assembly to endorse Palestine's declaration under Article 12(3) of the Rome Statute in a meeting convened under the Tenth Emergency Special Session, constituted in terms of the Uniting for Peace Resolution 377 A (V).

Recommendations relying on the Geneva Conventions.

(5) The League of Arab States should request the Swiss Government to convene a meeting of the State Parties to the Fourth Geneva Convention to consider the findings of the present Report.

(6) The League of Arab States should request states to consider taking action under Article 146 of the Fourth Geneva Convention to ensure that those suspected of having committed grave breaches of the Convention under Article 147 be investigated and prosecuted.

(7) The League of Arab States should remind State Parties to the Geneva Conventions that they are obliged by Article 1 of the Fourth Geneva Convention "to ensure respect" for the Convention. This obligation was confirmed by the International Court of Justice in its 2004 Advisory Opinion

on "*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*". It may be argued that the obligation contained in Article 1 "to respect and to ensure respect for the present convention in all circumstances" includes an obligation on all states to render whatever assistance they can to a state subjected to violations of the Convention.

Recommendations to other States.

(8) The League of Arab States should recommend to its members that they consider instituting legal proceedings against Israel in accordance with Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide, with due regard to the caution expressed in the present Report.

(9) The League of Arab States should encourage states to prosecute persons responsible for the international crimes identified in the present Report before their national courts (where universal jurisdiction statutes so permit).

(10) The League of Arab States should recommend to states that incurred damage to their property in the conflict in Gaza that they claim compensation from Israel for such losses.

Recommendations for action by the League of Arab States directly.

(11) The League of Arab States should facilitate negotiations between Fatah and Hamas in order to ensure that the welfare of the people of Gaza is not affected by the conflict between these two parties, particularly in the medical field.

(12) The League of Arab States should establish a documentation centre to keep a record of breaches of international humanitarian law in Palestine. Such an historical archive would ensure that a record is kept of crimes against the Palestinian people, and may assist any future action(s) taken by the League or other bodies.

(13) This report should be referred to the United Nations, the European Union, the African Union, the Organization of American States, the Organization of Islamic Conference, the Association of South East Asian Nations and the International Criminal Court; and distributed to relevant NGO's and the general public.